



DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
MANPOWER AND RESERVE AFFAIRS  
111 ARMY PENTAGON  
WASHINGTON, DC 20310-0111

March 26, 2003

MEMORANDUM FOR DEPUTY CHIEF OF STAFF, G-3

SUBJECT: Law Enforcement and Criminal Investigations – Military Police and Criminal Investigation Exemption Request

Reference memorandum, Deputy Chief of Staff (DCS), G-3 (DAMO-ODL), 14 January 2003, Subject: Third Wave Exemption Request—Function Codes S500, S510, S720, and I520.

**Functions.** These functions encompass the work performed by Army military police (MP), (military occupational specialty 31B and officer specialty 31A) Army Criminal Investigation Command (USACIDC) (military occupational specialty 95D and warrant officer specialty 311A), and civilian employees (career field 1811) performing law enforcement, personal security, and criminal investigations.

**Decision.** The law enforcement function in the operating forces, which includes MP operations, corrections and internment, and criminal investigations, is an Army core competency; the law enforcement functions in the infrastructure are core war-fighting competencies of the Army. These law enforcement functions are required under Title 10 of the U.S. Code to administer the Uniform Code of Military Justice (UCMJ), required under the Geneva Conventions to uphold U.S. treaty commitments, and required under the Department of Defense (DoD) Inspector General (IG) Act of 1978 and cannot be divested. The ability effectively to administer and enforce the UCMJ is critical to good order and discipline throughout the fighting force and the sustaining base. There are specific limitations in Title 10 requiring Government employees to perform certain security guard functions within the United States; in addition, the direct conduct of criminal investigations is an inherently governmental function. Prisoner detention and transport are not ordinarily inherently governmental functions. However, the command of members of the military confined in prisons pursuant to the administration of the UCMJ is inherently Governmental. *This determination does not preclude transferring the CONUS-based confinement function to the Federal Bureau of Prisons (FBOP), or outsourcing the non-inherently Governmental aspects of the function, provided there are measures taken to retain the "command" function within the Army. Confined soldiers maintain their military status until all appeals are exhausted and therefore should remain under military "command."*

There may also be a basis for exempting some non-inherently Governmental functions performed by CIDC and law enforcement personnel from private sector performance to avoid personal services arrangements. There are also legitimate reasons to avoid using contractors for law enforcement and investigative functions in

light of Federal Tort Claims Act immunity concerns. There is a basis for military performance of the law enforcement, corrections, and criminal investigative functions within the operating forces.

At the enclosure are instructions on how to implement this decision in the Inventory of Commercial and Inherently Governmental Activities (including the Federal Activities Inventory Reform Act Inventory), to be developed by DCS, G-1 in coordination with our responsible staff officers.

**Requestor's Positions on Issues.** With regard to law enforcement, the requestor was amenable to the idea of a contract guard force focused solely on installation access control operations, if the federal law can be changed, but wanted to retain MP law and order patrols on installations as a way to keep MPs trained and current, because the skills that are trained and developed on patrol are also required in a tactical environment.

With regard to criminal investigations, the functional proponent requests a total exemption from review for all spaces. Statutory requirements and international agreements, as laid out below, require certain military investigations. The skills that are required for complex criminal investigations during conflict are the skills that are trained and honed in garrison. Furthermore, criminal investigations must be conducted under a force structure that is sufficiently independent of the operational command to guard against conflicts of interest and unlawful command influence or the appearance thereof.

With regard to CONUS Army facilities, although there does not appear to be a prohibition on some other Federal Agency managing CONUS Army prisons, such an action would require re-negotiation of the existing Memorandum of Understanding between DoD and the FBOP, and the Department would likely have to reimburse the FBOP under the Economy Act for actual costs of all services rendered by the FBOP. Additionally, there is a requirement for military expertise in confinement operations during armed conflicts to meet our Geneva Convention responsibilities to confine appropriately Enemy Prisoners of War or other detainees. Loss of the CONUS Army prisons would severely degrade the Army's capability to manage high-risk prisoners, resulting in a detriment to current, and possible future, contingency operations. Also, for Army soldiers who are confined in FBOP facilities, there may be a possibility of increased rates of suicide, disease contraction, and violent assault incidents.

**Standard of Review.** The senior HQDA functional official for a function must describe and substantiate specifically how preparation and implementation of a Third Wave implementation plan for each course of action poses substantial and specific risks to a core war-fighting mission of the Army (i.e., a core competency) or violates a statutory requirement affecting a function. The following are the risk factors to evaluate

and consider: force management risk; operational risk; future challenges; and institutional risk. How these risk criteria are applied may vary based on each course of action evaluated (i.e., A-76; alternatives to A-76; military conversions; transfer to another agency; divestiture, and privatization). Therefore, exemption requests and decisions must assess the potentially adverse impact of each course of action.

**Core Competency Relevant to Risk Issue.** The law enforcement functions, which includes MP operations, corrections and internment, and criminal investigations, support at least three of the six recognized core competencies of the Army, as set forth in Army Field Manual 1 and The Army Plan. The Army's six core competencies are: Shape the Security Environment (Deter Forward); Prompt Response; Forcible Entry Operations; Mobilize the Army; Sustained Land Dominance; or Support Civil Authorities. The law enforcement functions cited above support Shaping the Security Environment; Forcible Entry Operations; and Support Civil Authorities. Therefore, there is a force management risk (i.e., career progression issue) and an operational risk associated with divesting the law enforcement functions. Force Management risk: the deployment turn-over ratio of MP units and CID Agents during Operations Enduring Freedom and Noble Eagle demonstrates there are insufficient numbers of personnel to maintain current operations tempo without risking dramatic reductions in retention due to the OPTEMPO of both Active and Reserve Forces. All MPs and CID Agents have been on a stop-loss order since the inception of the operations in support of the Global War on Terrorism. In the immediate aftermath of the September 11th attacks, MP 95Bs and 95Cs in both Reserve and Active Component were called upon to secure vulnerable outposts and transport and detain high-risk personnel. MPs and CID Agents were also called on to provide and augment force protection and anti-terrorism, and to coordinate with and support local, state, and Federal law enforcement as authorized by law. CID Agents were immediately mobilized to the crime scene at the Pentagon to secure the area and to gather evidence, and called upon to participate in joint investigations with the FBI to insure that the Army's interests were considered and that critical anti-terrorism information was provided to the military leadership.

MPs as a combat force functionally "Shape the Security Environment" by promoting regional stability and deterring conflict. MPs possess capabilities to effectively, safely and securely detain and incarcerate opposing forces; therefore, they are true combat multipliers and enable the combat commander to use his other soldiers to conduct other necessary operations. Likewise, CID Agents compliment these detention efforts, as has been seen in Afghanistan and GTMO, by contributing unique investigative skills to obtain valuable evidence and criminal intelligence from detainees. The success of the Army in accomplishing this mission is directly attributed to the consistent use of military personnel who daily train to accomplish the military mission.

During "Forcible Entry Operations" combat forces will capture significant numbers of enemy forces and criminals. 95B and 95C MP forces and CID Agents possess the capabilities to effectively, safely and securely investigate, apprehend, detain and incarcerate those opposing forces; therefore, enabling combat forces freedom to conduct other operations as required. In addition, CID Agents, with their ability to process a crime scene and other sensitive sites, have provided a combat multiplier in Afghanistan by their ability to enter a sensitive site, such as a suspected Al Qaeda cave, gather evidence in a reliable and systematic manner, collect appropriate samples for DNA testing and other remains identification operations, and sort through items found to provide criminal intelligence to U.S. Forces operating in the area.

An aspect of Shaping the Security Environment includes CIDC's Protective Services Unit (PSU), which provides protective services for the Secretary and Deputy Secretary of Defense, the Chairman and Vice Chairman of the Joint Chiefs of Staff, the Secretary of the Army, and the Chief of Staff of the Army, as well as for other Army personnel when needed, and for visiting high-risk foreign military personnel. No other unit in DoD is manned, trained, or equipped for this mission. Furthermore, protective services missions span the globe, deploy with high-risk personnel into combat theaters, and routinely call upon local CID Agents to augment the protective service teams as they travel to accomplish their mission.

In "Support of Civil Authorities", we note that newly established governments must achieve stability before reliable democratic government structures can operate. Previous operations in Panama, Haiti, Bosnia, and Kosovo (Camp Bondsteel), prove that a justice system, including criminal investigation, law enforcement and the apprehension and detention of anti-governmental forces in accordance with law must be established. Law and order and control through detainment, investigation, and incarceration that MP 95Cs, 95Bs and CID Agents provide are fundamental elements of both our own military justice system and the use of personnel in international operations. Domestically, as part of interagency and joint teams, or in support of another lead federal agency, MPs and CID Agents provide unique capabilities to support civil authorities in domestic contingencies, as authorized by law. Prompt assistance to civil authorities may be the decisive element in disaster relief or crisis resolution.

**Legal Requirements Relevant to the Divestiture Issue.** There is a solid basis for maintaining the criminal investigation function performed by the CIDC and the confinement functions performed by MPs because of the Geneva Convention requirement to investigate war crimes and confine Enemy Prisoners of War and other detainees. In addition, the Military Extraterritorial Jurisdiction Act of 2000 (MEJA) was enacted to allow the military to investigate civilians accompanying the force overseas, whether during conflicts or in peacetime. In the event of a declared war, civilians can

be investigated and prosecuted under the UCMJ, which would again require MPs and CID Agents. Although outside of the Geneva Convention requirements, MEJA jurisdiction is discretionary, without it, criminals will not be brought to justice unless a host nation took an interest in prosecution. Adopting this policy would subjugate U.S. interests to the prosecutorial discretion of foreign nations and would subject U.S. citizens to foreign court jurisdiction. It is U.S. policy to maximize U.S. jurisdiction over all military and civilian personnel accompanying the forces overseas rather than subject them to possible trial and punishment in foreign nations. The military implements this policy by negotiating Status of Forces Agreements (SOFAs), which allow the military to exercise criminal jurisdiction and conduct criminal investigations inside these foreign nations.

Transferring the criminal investigation function performed by the CIDC to another executive agency within the Federal Government is not constrained by the Geneva Convention requirements or the MEJA. However, the exercise of jurisdiction by such other agency outside the United States would require the State Department to successfully renegotiate all relevant SOFAs, which currently provide for U.S. *military* jurisdiction in foreign nations.

While there is no legal prohibition against divestiture and/or transfer of the criminal investigation function on military installations within the United States to another executive agency, such as the Federal Bureau of Investigation, such an action would require re-negotiation of the Memorandum of Understanding between DoD and Department of Justice. In addition, other CONUS missions currently performed by MPs and CID Agents would also have to be transferred. For example, without an organic law enforcement capability within the United States, the Army would lose much of its capability to collect criminal intelligence, to include anti-terrorism information, on U.S. persons. Under Executive Order 12333, military intelligence units are generally forbidden from collecting and maintaining intelligence on U.S. persons. Because the criminal intelligence mission must remain with law enforcement units, the Army would also have to transfer this mission to another executive agency. The Army would be required to reimburse the FBI under the Economy Act, 31 U.S. Code, Section 1535, for the actual costs associated with the FBI's performance of any missions the Army transfers.

It has also been suggested that state or local police forces could perform the police functions on military installations within the United States; however, there are Constitutional impediments and jurisdictional complexities affecting any effort to transfer investigative jurisdiction and other police functions to state or local governments. For example, the differing terms of each post's land grant or charter can result in proprietary, concurrent or exclusive jurisdiction over a military installation. MPs and CID Agents are able to work across these jurisdictional boundaries for investigations with a

“military nexus,” thereby providing a unique law enforcement and investigative capability to the Army. Local civilian authorities have no jurisdiction on an exclusive federal installation. In addition, they have no jurisdiction to investigate uniquely military offenses under the UCMJ, such as disobedience or Absence Without Leave (AWOL).

Even if local authorities have jurisdiction on some military installations, under the Federal Supremacy Clause of the United States Constitution, it would be improper for state and local governments to exercise authority and control over federal activities on a military installation or elsewhere by means of investigative and prosecutorial oversight. Furthermore, state laws generally cannot be enforced on exclusively federal military installations. As one example of the difficulties raised by these jurisdictional divisions, in 2002, Congress was required to pass specific legislation to allow military authorities to enforce state domestic violence protection orders and restraining orders on federal military installations (10 U.S. Code, Section 1561a).

Title 10, U.S. Code, Section 2465 provides in general that the security-guard function on installations located in the United States must be performed by Government employees unless the installation becomes a contractor operated facility, or unless the basis for arranging for performance by local municipalities afforded by Section 332 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003, P.L. 107-314 applies.

**Inherently Governmental Relevant to Outsourcing Issue.** An inherently Governmental function includes those activities that require either the exercise of substantial discretion in applying Government authority or the making of value judgments to make Governmental decisions. An inherently Governmental function is so intimately related to the public interest as to require performance by Federal Government employees; it does not include providing advice to Federal Government officials. According to the Office of Federal Procurement Policy Letter 92-1 and prior Army FAIR Act determinations, activities involved in the direct conduct of criminal investigations, such as those undertaken by the CIDC are inherently Governmental. The direct conduct of a criminal investigation also includes the requirement to access various law enforcement databases. These databases may be accessed only by appropriately designated law enforcement officers as thus cannot be separated from the law enforcement or criminal investigation functions. In addition, Office of Federal Procurement Policy Letter 92-1 provides that the approval of agency responses to Freedom of Information Act requests and approval of agency responses to administrative denials of Freedom of Information Act (FOIA) requests are inherently Governmental functions. Given that the USACIDC also is required to manage large quantities of criminal records held by the Army Crimes Records Center and to respond to requests for such records from the public under provisions of FOIA, such functions also could be deemed inherently Governmental. Finally, Office of Federal Procurement

Policy Letter 92-1 provides that prisoner detention and transport are not ordinarily inherently Governmental functions. However, the Office of Federal Procurement Policy Letter 92-1 provides that the command of members of the military is inherently Governmental. Therefore, it is arguable that so long as a prisoner is a member of the military, the command of those members of the military during their confinement in prisons is an inherently Governmental function.

**Personal Services.** The personal services issue is not relevant to law enforcement and criminal investigation functions, unless an employee is directly supervised by an inherently Governmental decision maker in circumstances where effective execution of duties requires the level of supervision found in an employer-employee relationship, rather than an independent contractor relationship. Avoiding a personal services arrangement may be an appropriate basis for exempting support functions within the law enforcement function and the CIDC, from private sector performance. Avoiding ambiguities regarding liability under the Federal Tort Claims Act (FTCA) is also a consideration favoring a broad application of the personal services exemption to the law enforcement and criminal investigation functional areas. The FTCA makes the government liable for torts committed by law enforcement personnel who are acting within the scope of their duties.

**Statutes Relevant to Sourcing Decision.** Title 10, U.S. Code, Section 2465 provides in general that the security-guard function in installations located in the United States must be performed by Government employees unless the installation becomes a contractor operated facility, or unless the basis for arranging for performance by local municipalities afforded by section 332 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003, P.L. 107-314 applies. Where the function is performed by civilian employees, these functions are subject to the standard statutory processes (10 U.S. Code, Sections 2461 and 8014 of the annual appropriations acts) that require public-private competition in all but a few circumstances, such as the exceptions for functions with 10 or fewer civilian employees and for use of the preferential procurement programs. These restrictions do not apply to functions solely performed by MPs.

**Conflict of Interest Issues.** The DoD Inspector General Act of 1978 was enacted in part to make the military criminal investigative agencies independent of command influence. DoD has implemented the DoD IG Act as it relates to criminal investigations through a series of DoD Directives, Instructions, and Manuals. DoDD 5106.1 provides that "the Secretaries of the Military Departments shall maintain authority, direction and operational control over their investigative organizations." DoDI 5503.3 implements the main conflict of interest protection for the military criminal investigative organizations, by providing that only the Military Secretaries and the DoD IG may delay, suspend, or terminate investigations. The 1989 Defense Authorization

Act added additional conflict of interest protections by directing the Navy and Air Force to make their criminal investigative organizations separate commands. The Army was not included in this legislation because CIDC was already a separate command. Although transferring or consolidating the CIDC with the MP investigators, thereby subjecting CID Agents to normal command channels within the Army, may not be specifically barred by law, such a reorganization is incompatible with the policy objectives that prompted the above legislative and Executive Branch actions. On the other hand, a transfer of the CIDC mission to the FBI would avoid the above conflict of interest policy concerns.

**Military Conversions.** Insofar as the military police and criminal investigation functions are core competencies, mandated by statute and treaties, and inherently Governmental, the basis for arguing for anything other than military performance is weak. The central issue concerns whether adequate performance of the function in the infrastructure requires military-unique knowledge and skills. The law enforcement and criminal investigation functions, while not requiring recent unique military skills in a U.S. garrison environment, do provide continued practical experience for MPs and CID Agents as they rotate through the Army infrastructure. Essentially, MPs and CID Agents who ultimately will be assigned to and deploy with Table of Organizations and Equipment (TOE)-designated units, obtain important practical experience while assigned to Tables of Distribution and Allowance (TDA) organizations and provide such TDA units with a valuable asset free of cost. According to Office of Secretary of Defense Guidance for compiling the Inventory of Commercial and Inherently Governmental Activities, military-unique knowledge and experience can only be derived from *recent* first-hand involvement in military activities – i.e., through commanding military forces or conducting or participating in military operations or exercises. This knowledge and experience must be more substantial than familiarity with doctrine, tactics, operations, or regulations; capabilities that can be developed by civilians; or, advice military retirees can provide based on their knowledge and experiences. Although the law enforcement function performed by MPs and CID Agents is a core war-fighting competency, there has not been substantiation that performance of the law enforcement and criminal investigation functions in TDA units in the United States requires the military unique knowledge and skill associated with an MP or CID Agent. However, there is a legitimate basis for exempting these functions from conversion to civilian performance within such TDA activities in the United States to provide for career



progression or rotation exemptions, (addressed in a separate decision) for MP and CID personnel.

A handwritten signature in black ink, reading "Reginald J. Brown". The signature is written in a cursive style with a prominent initial "R".

Reginald J. Brown  
Assistant Secretary of the Army  
(Manpower and Reserve Affairs)

Enclosures

## **CODING RULES for CIDC/MP**

### **1. CIDC**

- a. All MTOE units
- b. All OCONUS TDA units
- c. All CONUS TDA units

Code A – Military Operations  
Code E – Civilian Decision and Control  
Code M – DoD Management Decision

### **2. Military Police in Operating Forces (in both CIDC and other MACOMs)**

- a. Military In SRC19 MTOE units
- b. Military In SRC19 MTOE Augmentation units
- c. Civilians in SRC19 MTOE Augmentation units

Code A – Military Operations  
Code F – Military Unique Skills and Knowledge  
Code G – Exemption for Military Support

### **3. Prison Staff at the following locations:**

W21BAA – Correctional Barracks FT Leavenworth  
W0UXAA (Paras 501-501C or DUIC W0UX2A) – FT Knox  
W0VGAA (Paras 401-401C or DUIC W0VGA2) – FT Sill  
W12KAA (Paras 501-501D) – FT Lewis  
WHNPAA – Mannheim (MTOE unit – coded per Rule 2. above)  
WBY7AA – Korea (MTOE unit – coded per Rule 2. above)

- a. Facility Managers
- b. All other military and civilian personnel

Code F – Military Unique Skills and Knowledge  
Code P – Pending Restructuring

4. Provost Marshals Offices, includes:

Resources in MDEP: QLPR – Law Enforcement, Physical Security, Plans, Training & Mobilization Activities  
QSEC – Directorate of Security

- and -

Resources in BOS APEs: \*\*\*\*75.\*\*\* – Force Protection  
\*\*\*\*96.100 – Provost Marshal  
\*\*\*\*96.7A0 – AT/FP  
\*\*\*\*96.7B0 – Installation Security Program Management  
\*\*\*\*96.800 – Security Guard  
\*\*\*\*96.T\*\* – Provost Marshal/Force Protection/AT/Preservation of Order

- and -

Resources in the same TDA paragraphs as those defined above.

- a. Military OCONUS
  - b. Civilian OCONUS
  - c. Military and Civilian CONUS
- Code F – Military Unique Skills and Knowledge  
Code G – Exemption for Military Support  
Code M – DoD Management Decision